RECEIVED
FEB 21 1995
OFFICE OF THE CLERK

(8)

No. 94-749

IN THE
Supreme Court of the United States
October Term, 1994

JOHN J. HURLEY, INDIVIDUALLY, AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,

Appellants,

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, AN UNINCORPORATED ASSOCIATION, BY AND THROUGH, TIMOTHY DALEY, BARBRA KAY AND CATHLEEN FINN, ACTING ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF THE ASSOCIATION,

Appellees.

ON APPEAL FROM THE
SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF BOY SCOUTS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF REVERSAL

Of Counsel:
DAVID K. PARK
National Legal Counsel
BOY SCOUTS OF AMERICA
1325 Walnut Hill Lane
Irving, Texas 75038
(214) 580-2005

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

BEST AVAILABLE COPY

32pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE TESTS FOR DETERMINING CONSTITUTIONAL PROTECTION OF EXPRESSIVE ASSOCIATION 6

A. Defining an Expressive Association 7

B. The Nexus Between Membership Policies and Associational Views 8

C. Compelling State Interests Unrelated to the Suppression of Ideas 11

II. THE PATTERN OF ERRORS IN READING AND APPLYING THIS COURT'S TESTS 13

A. Defining Associational Expression 14

Page

B. An Expressive Association May Exclude an Unwanted Message Even If Its Own Messages Do Not, in So Many Words, Expressly Contradict the Unwanted Message 17

C. Identifying Compelling State Interests Unrelated to the Suppression of Ideas 20

III. THE COURT BELOW REACHED THE WRONG RESULT 22

A. The Parade Is an Expressive Association 22

B. A Sufficient Nexus Exists Between the Exclusion and the Expressive Association 23

1. The Parade Group's View 24

2. GLIB Would Introduce Unwanted Views 24

C. No Compelling Interest Unrelated to the Suppression of Ideas Exists 25

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 9

Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) ..... *passim*

City of Dallas v. Stanglin, 490 U.S. 19 (1989) 8

Curran v. Mt. Diablo Council of the Boy Scouts of America, 23 Cal. App. 4th 1307, 29 Cal. Rptr. 2d 580, *review granted*, 31 Cal. Rptr. 2d 125, 847 P.2d 900 (Cal. 1994) 14

Democratic Party v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981) 8, 9

Elrod v. Burns, 427 U.S. 347 (1976) 12

Gay Law Students Association v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 156 Cal. Rptr. 14, 595 P.2d 592 (1979) 18

Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 536 A.2d 1 (D.C. Ct. App. 1987) 18

Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963) 3, 7, 8, 16

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) 6n, 9

Griswold v. Connecticut, 381 U.S. 479 (1965) 7

TABLE OF AUTHORITIES
(Continued)

Page

CASES

Healy v. James, 408 U.S. 169 (1972) 7, 12

Hishon v. King & Spalding, 467 U.S. 69 (1984) 8, 12

Merino v. San Diego Council of Boy Scouts of America, No. 659236 (Cal. Super. Ct.), *appeal docketed*, No. D021969 (Cal. Ct. App. Sept. 21, 1994) 14, 17, 18, 21, 22

Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984) 9

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 6n, 9

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 7, 12

New York State Club Association v. City of New York, 487 U.S. 1 (1988) 8, 11, 26

Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) 12

Olmstead v. United States, 277 U.S. 438 (1928) 11

Randall v. Orange County Council, Boy Scouts of America, No. 650394 (Cal. Super. Ct. June 30, 1992), *aff'd*, 28 Cal. App. 4th 50, 28 Cal. Rptr. 2d 53, *review granted*, 31 Cal. Rptr. 2d 125, 847 P.2d 900 (Cal. 1994) 15, 16, 21

TABLE OF AUTHORITIES
(Continued)

Page

CASES

Riley v. National Federation of the Blind, 487 U.S. 781 (1988) 18

Roberts v. United States Jaycees, 468 U.S. 609 (1984) ..... *passim*

Runyon v. McCrary, 427 U.S. 160 (1976) 13n

Shelton v. Tucker, 364 U.S. 479 (1960) 7

United States v. Lee, 455 U.S. 252 (1982) 12

Welsh v. Boy Scouts of America, 742 F. Supp. 1413 (N.D. Ill. 1990) 15, 22

Welsh v. Boy Scouts of America, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 114 S. Ct. 602 (1993) 15n

MISCELLANEOUS

Alexis De Tocqueville, *Democracy In America* (P. Bradley ed. 1945) 3-4

Encyclopedia of Associations (29th ed. Gale Research Inc. 1995) 4

Boy Scouts of America, as *amicus curiae*, supports reversal of the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in this case. 418 Mass. 238, 636 N.E.2d 1293 (1994).

INTEREST OF THE AMICUS CURIAE

Boy Scouts of America ("Boy Scouts") is a charitable volunteer membership organization which has as its mission instilling in boys and young people the values found in the Scout Oath and Law:

Scout Oath

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

Scout Law

A Scout is:

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent

The Boy Scouts' programs are brought to young people principally by the adult volunteer members of Boy Scouts who serve as leaders of Cub Scout Packs, Boy Scout Troops,

and Explorer Posts, acting as role models and guides for youth members. In turn, older youth members serve as leaders and models for younger members.

To ensure that members share Scouting's values, Boy Scouts has established membership requirements that all potential members must satisfy. Each potential Boy Scout must agree to live by the Scout Oath and Law. Each adult member must subscribe to the Scout Oath, the Scout Law, and Boy Scouts' Declaration of Religious Principle.

If Boy Scouts is to maintain the integrity of its message to youth, it must be able to control its own membership policies. Yet interest groups which seek to change Boy Scouts' moral and religious viewpoints have invoked federal, state and local "public accommodations" laws like the one in Massachusetts to attack Boy Scouts' membership policies and force Boy Scouts to accept those who are opposed to Scouting's moral or religious views. In addition to the federal statute, public accommodations laws in California, Illinois, New Jersey, Florida, Oregon, Connecticut, Minnesota, Pennsylvania, Washington D.C., Kansas and a number of cities have been invoked or are being invoked now to support actions against Boy Scout groups. In each of the nine administrative or court actions pending currently, the Boy Scout defendants have raised an expressive association defense. Despite Boy Scouts having devoted substantial resources to the defense of these cases -- one of which has lasted 15 years -- Boy Scouts' constitutional right to determine its own membership policies remains unsettled, and Boy Scouts remains subject to attack in one jurisdiction after another. If freedom of association cannot be enjoyed without expenditures of this magnitude, freedom of association is an empty letter.

The *Hurley* case presents issues of vital importance to all organizations which select members and participants on the basis of the organization's values and beliefs. This case provides the Court with the opportunity to clarify and thus preserve the associational freedom afforded to such organizations. The ideological battleground of today's varying moral and religious viewpoints should not be the court system, but the marketplace of ideas.

Freedom of association is the cornerstone of a free society. As Justice Douglas observed:

> A Free Society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, economic, religious, educational, and political programs are formulated.

Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 563 (1963) (Douglas, J., concurring).

Writing 160 years ago, Alexis De Tocqueville recognized both the importance of associations to American society --

> Americans of all ages, all conditions, and all dispositions, constantly form associations . . . . [In] no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America.

-- and the central role of the right of association to personal liberty:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of

> acting in common with them. The right of association therefore appears to be as almost inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

Alexis De Tocqueville, *Democracy In America*, Vol. II at 114 and Vol. I at 198, 203 (P. Bradley ed. 1945).

Today, the role of associational freedom is no less important. A half hour's browsing through the *Encyclopedia of Associations* (29th ed. Gale Research Inc. 1995), with its 22,000 listings covering only a fraction of America's associations, demonstrates more eloquently than any brief the vital role played by associations in our pluralistic society. The state has no interest in diluting or blunting the messages of voluntary associations; to the contrary, the state should nurture a climate in which collective voices can be heard.

On the basis of its extensive, if unsought, experience as to the fate of associational rights in the face of public accommodations laws, Boy Scouts is able to say that the errors of analysis by the majority of the Supreme Judicial Court of Massachusetts in *Hurley* are not isolated, but are a part of a pattern which is reflected time and again in Boy Scout cases. To assist this Court, this brief analyzes the pattern of errors which has resulted in the failure to properly recognize associational rights under the Constitution of the United States.

SUMMARY OF ARGUMENT

The constitutional right of freedom of expressive association has not been receiving the degree of protection called for by the decisions of this Court because lower courts are misinterpreting all three elements of the test set forth in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

First, as in *Hurley*, courts have failed to recognize that groups with broad-based, popular messages are entitled to expressive associational protection to the same degree as single-issue groups with minority views. Second, as in *Hurley*, courts have limited the right to exclude unwanted messages to associations which express an explicitly contradictory message, and denied this right to associations which choose to express subtler disagreement or to maintain a neutral stance on the subject. Third, as in *Hurley*, courts have determined the existence of a compelling state interest unrelated to the suppression of ideas by looking at public accommodations statutes in the abstract, thereby failing to recognize that in circumstances such as the *Hurley* parade, the only interest present is an interest in suppressing ideas.

This case presents the Court with an opportunity to provide guidance to courts and litigants so that freedom of association may retain the integrity it requires in our constitutional scheme.

ARGUMENT

I.

THE TESTS FOR DETERMINING CONSTITUTIONAL PROTECTION OF EXPRESSIVE ASSOCIATION

This Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987), set forth a framework for constitutional protection of expressive associations.[1] The membership decisions of an association cannot constitutionally be regulated if:

(1) the association is expressive, and

(2) the association's decision to exclude avoids impairment of the association's expressive goals;

unless

---

1. In *Roberts*, this Court analyzed associational freedom as composed of freedom of "expressive" association and freedom of "intimate" association. These categories may not be sufficiently inclusive to cover all types of associations which this Court has described as entitled to Constitutional protection. *See, e.g., Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974), quoting with approval Justice Douglas' dissent in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972):

> 'The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established.'

(3) the regulation of the membership decision serves compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

Roberts, 468 U.S. at 622-23; *Rotary*, 481 U.S. at 548-49. The elements of this three-part test are discussed below.

A. Defining an Expressive Association

This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622. Freedom of association is "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). It is "beyond debate that freedom to engage in association for the advancement of beliefs and ideas" is protected by the Constitution. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). *Accord Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 543-44 (1963); *Healy v. James*, 408 U.S. 169, 181 (1972).

Joining a particular group is an expression of a person's support for that group's goals and principles: The First Amendment freedom of expression "includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). As this Court has observed, freedom of association is a means by which freedom of speech can be made effective: "The ability and the opportunity to combine with others to advance one's view is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the

government." *New York State Club Association v. City of New York*, 487 U.S. 1, 13 (1988). *See also Gibson*, 372 U.S. at 563, 570 (1963) (Douglas, J., concurring).

While the right to freedom of association itself has been firmly established, this Court has not had occasion to make fine distinctions as to what constitutes expressive association, as the cases for the most part have involved either a prototypical expressive association, such as a political party, *see, e.g., Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121-22 (1981), or a group which barely constituted an association at all, such as the group of teenagers who happened to be at the Twilight Skating Rink dance hall on a particular night. *See City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (holding that teenagers who "are not members of any organized association" and do not "take positions on public questions" do not constitute an expressive association).

B. The Nexus Between Membership Policies and Associational Views

As Justice Powell has noted, "With respect to laws that prevent discrimination, much depends upon the standards by which the courts examine private decisions that are an exercise of the right of association." *Hishon v. King & Spalding*, 467 U.S. 69, 80 n.4 (1984) (Powell, J., concurring). Much depends upon the nature of the nexus an organization must demonstrate between its membership policies and its associational views in order to enjoy constitutional protection for those policies.

An essential ingredient of the right to join with others is the right to define the group's identity and purposes through membership criteria. As this Court has explained,

" 'Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.' " *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974) (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 180 (1972) (Douglas, J., dissenting)). *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). The constitutional right to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party*, 450 U.S. at 122. The exercise of this prerogative to exclude others from the group is as entitled to constitutional autonomy as is the initial decision to form the group. "Freedom of association therefore plainly supposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Thus, the First Amendment equally protects citizens in exercising their "freedom to associate or not to associate with whom they please." *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984).

This Court has described the nexus required between membership requirements and associational goals primarily in four cases -- *Democratic Party*, *Roberts*, *Rotary*, and *New York State Club Association*. In *Democratic Party*, which involved a quintessentially expressive association, this Court announced a deferential test, requiring only that the association demonstrate a relationship between the membership decision and a genuine goal of the organization, stating that "the stringency, and wisdom, of membership requirements is for the association and its members to decide -- not the courts . . ." 450 U.S. at 123 n.25.

In the context of later cases involving quasi-commercial associations conferring business advantages on members, some have argued that this Court imposed a stricter standard.

The organizations at issue in *Roberts* and *Rotary*, which essentially sold leadership skills as "goods" and business contacts and employment promotions as "privileges" and "advantages," *Roberts*, 468 U.S. at 626; *Rotary*, 481 U.S. at 549, failed to demonstrate that they would have to alter or abandon their views or activities if women were admitted as members. As shown by the fact that women already participated in the organizations, albeit with second-class stature, 468 U.S. at 613; 481 U.S. at 541, the admission of female members had no foreseeable, let alone demonstrated, impact on the organizations' expressive goals or activities. The Jaycees and the Rotary failed to demonstrate that the exclusion of women from membership had any real nexus to those organizations' views.

While the organizations involved in *Roberts* and *Rotary* clearly failed to demonstrate the relationship between membership requirements and organizational goals required by *Democratic Party*, some have argued that language in *Roberts* and *Rotary* indicates that those organizations were required to meet a higher standard. Thus, in explaining the need for associations to have freedom to limit membership, the Court in *Roberts* observed that the admission of the undesired member "may impair the ability of the original members to express only those views that brought them together." Similarly, the Court observed that the Jaycees did not contend that Minnesota's public accommodations law had been applied to them "for the purpose of hampering the organization's ability to express its views." 468 U.S. at 623-24. In *Rotary*, the Court observed that the evidence failed to show that the admission of women members "will affect in any significant way the existing members' ability to carry out their various purposes," and that the application of the law would not require Rotary to "abandon or alter" its activities. 481 U.S. at 548.

While, as shown below, these passages sometimes have been misread, *Roberts* and *Rotary* in fact do no more than impose the requirement set forth in *Democratic Party* of demonstrating a relationship between the membership requirements and the organization's goals.

Finally, in *New York State Club Association*, there had been no attempt whatever to show a link between membership policies and goals in any particular club, and this Court stated expressly, "If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end." 487 U.S. at 13. Given this statement, the Court's observation that an association might be able to show that "it will not be able to advocate its desired viewpoints nearly as effectively" if it could not limit its membership to those of the same sex or religion, *id.*, appears to be simply a restatement of the demonstrated relationship test of *Democratic Party*.

C. Compelling State Interests Unrelated to the Suppression of Ideas

As the Court observed in *Roberts*, "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." 468 U.S. at 623. In assessing the state's justification for such an intrusion, skepticism is required, for as Justice Brandeis cautioned in *Olmstead v. United States*, 277 U.S. 438, 479 (1928), "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." That caution applies with special force where the state proposes to elevate the non-constitutional interests of one class of citizens over the constitutionally protected

right of an expressive association to adopt and enforce its own membership criteria.

Because of this concern, this Court has insisted that any attempt by the state to override First Amendment rights requires the state to prove that the public purpose sought to be achieved is not only legitimate, but "compelling," and that it cannot be achieved without impinging upon constitutional rights. *See, e.g., United States v. Lee*, 455 U.S. 252, 256-61 (1982); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Healy v. James*, 408 U.S. 169, 184 (1972); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 461 (1958). Most recently, the Court stated in *Roberts*:

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve *compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive* of associational freedoms.

468 U.S. at 623 (emphasis added).

Consideration of what constitutes a compelling interest must include consideration of the nature of the activity being regulated. If the state seeks to eliminate restrictions on participation in economic activities, it deserves greater deference. *Roberts* and other cases have affirmed this concept in the context of access to employment and advancement in the commercial marketplace. *See Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 460-62 (1978). While the government's interest in regulating organizations grows with the increase in the organization's ability to control access to

basic goods, services, or jobs, the state's interest becomes far weaker when access to social recognition is the sole issue.[2]

Even if compelling, a state interest must also be "unrelated to the suppression of ideas" in order to override a constitutional right. Both *Roberts* and *Rotary* assess whether the state's interest is unrelated to the suppression of ideas by looking both at the face of the statute and at the particular situation in which the state seeks to apply the statute. *Roberts*, 468 U.S. at 624-28; *Rotary* 481 U.S. at 548-49. However, while the *Roberts* Court expressly indicated that it was examining the statute as "applied," 468 U.S. at 624, the *Rotary* Court did not, and its discussion of the state's interest in the situation under consideration is a brief one. 481 U.S. at 549. This has led some to misread the opinion as holding that the statute's facial validity is all that needs to be considered.

II.

THE PATTERN OF ERRORS IN READING AND APPLYING THIS COURT'S TESTS

In the context of expressive groups and would-be members who fall within protected classes because of their stated sexual orientation or religion, the application of *Roberts* by lower courts has been woefully inadequate. Mistaking differences of opinion for invidious

---

2. Racial exclusions may stand on a different footing in light of three constitutional amendments reflecting affirmative constitutional policies prohibiting racial segregation and seeking the elimination of "badges of slavery" in American society. *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1976).

discrimination, courts have misused *Roberts* to trample expression on issues of sexual morality and religious belief.

Like the majority opinion below, opinions in Boy Scout cases have erred with respect to all three elements of the test -- defining associational expression, identifying the required nexus between membership policies and expression, and assessing state interests.

A. Defining Associational Expression

An association which sincerely seeks to promote a viewpoint on moral or religious issues is constitutionally entitled to limit membership to those who share that viewpoint. While one would have thought that this principle was sufficiently clearly established by this Court's decisions, lower courts have denied associational protection where the expressive value was one among several held by the organization, was broadly phrased, or had wide popularity and many adherents.

For example, in the face of a stipulation of the parties as to the content of the Scout Oath, the Scout Law, and the Declaration of Religious Principle -- which constitute a virtual litany of moral, educational, social, and religious values -- the trial court in *Merino v. San Diego Council of Boy Scouts of America*, No. 659236 (Cal. Super. Ct.), *appeal docketed*, No. D021969 (Cal. Ct. App. Sept. 21, 1994), concluded that, "The Boy Scouts does not exist for an 'expressive' purpose." *But see Curran v. Mt. Diablo Council of Boy Scouts of America*, 23 Cal. App. 4th 1307, 29 Cal. Rptr. 2d 580, 586, *review granted*, Cal. Rptr. 2d 126, 847 P.2d 901 (Cal. 1994). Similarly, the decision of the district

court in *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413, 1431-32 (N.D. Ill. 1990), on a motion to dismiss[3] suggested that Scouting's requirement that members pledge to do their duty to God was not entitled to constitutional protection because it was nonsectarian. Again, in *Randall v. Orange County Council, Boy Scouts of America*, No. 650394 (Cal. Super. Ct. June 30, 1992), *aff'd*, 28 Cal. App. 4th 50, 28 Cal. Rptr. 2d 53, *review granted*, 31 Cal. Rptr. 2d 125, 847 P.2d 900 (Cal. 1994), the court held that Boy Scouts was not a protected association with respect to religious expression, even though the court made express findings that:

> (1) the "purposes of Scouting" are "to assist young boys in developing into worthwhile citizens by teaching them . . . reverence,"
>
> (2) "the religious aspects of scouting" are "a definite part of the program,"
>
> (3) Cub Scouts refer to "a supreme being or 'God' in . . . the Cub Scout Promise and the Scout Oath,"
>
> (4) the Cub Scout Promise is "said or practiced" at Den meetings, and
>
> (5) the "Cub Scout Promise may be a 'Code of Conduct'" for the young members.

Randall, No. 650394, Statement of Decision at 11-13, 15.

---

3. Three years later, after trial and appeal, the case was finally decided in favor of Boy Scouts on statutory grounds. *Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 114 S. Ct. 602 (1993).

Courts cannot subject an association with a sincere, broad-based collection of messages to less constitutional protection than a narrowly focused association. A general attempt at the "inculcation of traditional values," *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring), deserves the same protection as an effort to promote one particular value. The Constitution does not protect views only because they are unorthodox or the voices that express them only when they are strident.

Similarly, the Constitution protects a message with broad appeal just as it protects a message with limited appeal. *See Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 570 (1963) (Douglas, J., concurring) (First Amendment protects both popular and unpopular groups). A large membership does not constitute evidence that the organization's message is meaningless or somehow too watered-down to receive protection; individuals join an organization and maintain their membership because they agree with its message.

Courts cannot require that organizations cross-examine each potential member to ensure that each understands the viewpoint in exactly the same way: the Catholic Church and the Democratic Party would both fail such a test, yet each observes ordination and leadership standards, respectively, which are protected by the Constitution. Nevertheless, the court of appeal in *Randall* ruled that Boy Scouts was not entitled to associational protection because it had a large membership and admitted applicants for membership without investigation. 28 Cal. App. 4th at 54-55, 28 Cal. Rptr. 2d at 55-56. An organization which is open to those, but only those, who formally accept and subscribe to its message cannot be considered unselective as far as expression is concerned.

B. An Expressive Association May Exclude an Unwanted Message Even If Its Own Messages Do Not, in So Many Words, Expressly Contradict the Unwanted Message

Boy Scouts' values are not a litany of negatives, but affirmations of what qualities Boy Scouts believes a good person should possess. For this reason, Boy Scouts chooses not to list what specific behavior it considers to be prohibited or immoral, including homosexual conduct. With respect to sexual morality, Boy Scouts' literature simply refers boys to their obligation to be "morally straight" in the Scout Oath and "clean" in the Scout Law, and encourages traditional family values and responsibility toward girls they will someday marry. Volunteer leaders are to provide positive role models of "morally straight" and "clean" as interpreted by Boy Scouts, and to respond appropriately to questions of sexual morality posed by youth.

In *Merino v. San Diego Council of Boy Scouts of America*, No. 659236 (Cal. Super. Ct.), *appeal docketed*, No. D021969 (Cal. Ct. App. Sept. 21, 1994), a homosexual rights advocate sought to be admitted as an adult leader of a Scouting group in San Diego, California. Merino *stipulated* that Boy Scouts expelled him based on a belief that avowing homosexuality does not conform with the requirement that an adult Scout leader subscribe to the Oath and Law:

> Because *Boy Scouts of America believes* that homosexual conduct is inconsistent with the Scout Oath and Law, Boy Scouts of America does not accept known or avowed homosexuals as adult leaders.

Merino, Statement of Decision at 7 (emphasis added).

Based in part on evidence that *Boy Scout Handbooks* do not "use the word 'homosexual' or any synonym thereof," the trial court rejected Boy Scouts' expressive association defense and characterized Boy Scouts' belief that a homosexual activist was not an appropriate Scouting role model as "invidious discrimination against certain individuals based on stereotyped notions." *Merino*, Statement of Decision at 16.

This ruling displays several common errors in analyzing the nexus issue. First, the court arrogated to itself the determination of the content of Boy Scouts' affirmative moral message. Second, the court treated a decision based on a conflict arising out of the expression of moral values as status-based discrimination. *See also Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 27-28 (D.C. Ct. App. 1987) (making a similar error). In fact, as the court in *Gay Law Students Association v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 487-88, 156 Cal. Rptr. 14, 32, 595 P.2d 592, 610 (1979), recognized, the act of a homosexual "coming out of the closet" and acknowledging his homosexuality is political activity. Third, the Court improperly required Boy Scouts to have a pointedly and explicitly contradictory expressive message of its own in order to entitle it to exclude Merino's message from Boy Scouts' program of moral education. However, an association is constitutionally entitled to limit its expression to the content it has chosen. *Riley v. National Federation of the Blind*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.").

Persons with overt religious and sexual viewpoints necessarily inject that expression into an association, which may or may not choose to claim that message as its own. In *Randall*, two atheist plaintiffs not only alleged that they were

atheists, but also declared their atheism and their hostility to Boy Scouts' theism in numerous television and radio interviews. They testified that they would not agree to do their duty to God, would not recite the duty-to-God portion of the Oath, and would not engage in the required duty-to-God requirements for advancing in rank. In *Merino*, plaintiff stipulated that he had publicly announced that he is a homosexual and testified to having made public statements concerning his own activism on behalf of homosexuals. These plaintiffs cannot remotely be said to have sought membership in an expressive association from an expressively neutral position. Plaintiffs such as these clearly stand for particular religious and moral views.

An organization whose very mission is to convey religious or moral views must be constitutionally protected from having to accept as members those with opposing or different views. Thus, even if the *Merino* court had been correct when it concluded that Boy Scouts stated no view concerning homosexuality or homosexual conduct, as an expressive association it should have been permitted to preserve the absence of such a message. One of Boy Scouts' adversaries has argued that Boy Scouts could exclude an avowed homosexual if it were the Anti-Homosexual League, but cannot do so as the promoter of the values in the Scout Oath and Law. This is bad constitutional law. An association has the constitutional freedom to maintain a subtly negative or neutral perspective on a moral or religious issue as well as an overt and strident one. *See Roberts*, 468 U.S. at 636 (O'Connor, J., concurring) (noting Boy Scouts' methods of "develop[ing] good morals" through "quiet persuasion, inculcation of traditional values, instruction of the young, and community service").

C. Identifying Compelling State Interests Unrelated to the Suppression of Ideas

As this Court held in *Roberts*, state interests can overcome otherwise constitutionally-protected associational rights only when the state interests are both "compelling" and "unrelated to the suppression of ideas." *Roberts*, 468 U.S. at 623-24.

In focusing on the state's interest in enacting a law as an abstract matter rather than the state's interest in applying the law in a particular fact situation, courts have found state interests controlling when those interests were not only not compelling but also related virtually entirely to the suppression of ideas. In the context of permitting African-Americans access to food, lodging, and transportation -- the original and core concerns of public accommodations laws -- it is accurate to say that a state has a compelling interest in eliminating discrimination.

When, however, the state interprets its public accommodations law so broadly as to reach voluntary associations founded not for economic but for expressive goals, the claim of a state interest in eliminating "discrimination" is a claim to a state interest in suppressing ideas. Boy Scouts maintains membership policies which exclude atheists, agnostics and homosexual activists because their expression of ideas is in conflict with the message Boy Scouts seeks to send to youth, so state regulation of these policies can only be related to the suppression of Scouting's ideas.

Discrimination, despite its pejorative connotations, constitutes the generic act of deciding who one's associates will be and who they will not be, with whom one chooses to identify and with whom one chooses not to identify. While

this Court in *Roberts* clearly acknowledged the right of a group not to associate with someone in order to avoid dilution of the group's message, 468 U.S. at 623, 627-28, lower courts have often found a compelling state interest in suppressing ideas by forcing such dilution. For example, the trial court in *Randall*, noting the vigor with which Scouting parents and other volunteer leaders had defended their right to limit their association to persons who believe in God and agree to do their duty to God, concluded:

> Such an emotional desire to refrain from or avoid association with those who are different illustrates the absolute need for legislation such as California's Unruh Act.

Randall, Statement of Decision at 17. Similarly, the trial court in *Merino* held that Boy Scouts was required to admit a gay activist as a volunteer adult leader despite Boy Scouts' disagreement with him on the morality of homosexual conduct:

> Any impact the application of the Unruh Act has on the expressive associational rights of the Boy Scouts is justified by the compelling state interest of the Unruh Act to eliminate arbitrary discrimination.

Merino, Statement of Decision at 18.

Lower courts have similarly erred in deciding whether a state's interest in a particular enforcement of its public accommodations law is unrelated to the suppression of ideas, considering the law only in the abstract and failing to examine whether in the particular case there existed any interest other than an interest in suppressing ideas. Thus, in denying a motion to dismiss the complaint brought by an agnostic youth who wanted to be a Cub Scout while refusing

to take the Cub Promise to do his duty to God, the district court in *Welsh* held that the governmental interests served by the federal public accommodations law are unrelated to the suppression of ideas. 742 F. Supp. at 1433. And the trial court in *Merino*, ruling that an openly gay man had to be accepted as the Explorer Advisor to an Explorer Post, concluded that the interests served by California's Unruh Act are unrelated to the suppression of ideas. Statement of Decision at 18.

III.

THE COURT BELOW REACHED THE WRONG RESULT

A. The Parade Is an Expressive Association

The *Hurley* parade group constitutes a protected expressive association. The parade group made a selection as to which messages would be included. The parade, as characterized by the trial court, "represented" diverse "interests and viewpoints," including "religious," "eleemosynary," "patriotic" and "moral" viewpoints. 418 Mass. 238, 244, 636 N.E.2d 1293, 1296. The group itself characterized its views as "traditional religious and social values." 418 Mass. at 242, 636 N.E.2d at 1295. These purposes constitute the precise purposes this Court has recognized as expressive. *See Roberts*, 468 U.S. at 622.

The fact that the parade's presentation was also lighthearted and entertaining to spectators does not indicate that the parade fails to merit protection. Neither does the popularity of the parade. 418 Mass. at 243, 247, 636 N.E.2d at 1296, 1298. The majority's opinion that broad-based

messages with broad appeal merit no constitutional protection cannot be correct if the views of the majority of Americans are to be protected. As the dissent states:

> [T]he Veterans Council *does not need a narrow or distinct theme or message* in its parade for it to be protected under the First Amendment. Both the judge and the majority try to illustrate that the parade is a public celebration with no distinct, unified theme; the implication is that it is not expressive activity, and is therefore not worthy of First Amendment protection. This analysis is erroneous. . . .

418 Mass. at 256-57, 636 N.E.2d at 1303 (Nolan, J., dissenting) (emphasis added). The parade's broad message is protected even if the sponsor does not cross-examine "each applicant" about the specifics of its message or views. 418 Mass. at 244, 636 N.E.2d at 1296. The applicants seek to include themselves in the parade because they agree with the parade's expression and view themselves as being able to play a role in that expression. If they change their outlook on the parade, they need not apply to march in upcoming years. As the dissent concludes, "We have never been in the business of protecting only internally consistent, narrowly focused, politically sensitive speech." 418 Mass. at 260, 636 N.E.2d at 1305 (Nolan, J., dissenting).

B. A Sufficient Nexus Exists Between the Exclusion and the Expressive Association

Having passed the threshold test for an expressive association, the next determination must be that the parade group, with its religious and moral viewpoints, is entitled to determine that its viewpoints are incompatible with GLIB's

viewpoints. A sufficient nexus exists between the exclusion of GLIB and the parade as an expressive association.

1. The Parade Group's View

The parade group sincerely held or sincerely wished to hold "traditional religious and social values," and one method by which it demonstrated those values was "to exclude groups with sexual themes." 418 Mass. at 242, 636 N.E.2d at 1295. Consistent with these values the group had included South Boston Baptist "Bible Trolley" and Massachusetts Citizens for Life, and excluded groups which inserted unwanted political messages, such as ROAR, the Ku Klux Klan, the Massachusetts Right to Life, and a truck carrying antihomosexual signs. 418 Mass. at 244 n.10, 636 N.E.2d at 1296 n.10. The parade group apparently viewed GLIB as another unwanted political message. 418 Mass. at 242 n.8, 636 N.E.2d at 1295 n.8.

Even if the parade group had no stated view concerning homosexuality, the group had a right to preserve its neutrality or even define its view by exclusion of GLIB. As the dissent aptly observes:

> [R]egardless of whether the parade has one message, ten messages, or no message at all, if GLIB's particular message is not in the parade, it cannot constitutionally be forced on the Veterans Council.

418 Mass. at 257, 636 N.E.2d at 1303 (Nolan, J., dissenting).

2. GLIB Would Introduce Unwanted Views

GLIB's message is decidedly different from the parade group's messages. GLIB affirmatively states that it sought to

participate in order to take on the parade group on expressive grounds:

> GLIB's purposes are *to express* its members' pride in their dual identities as Irish or Irish-American persons who are also homosexual or bisexual, *to demonstrate* to the Irish-American community and to the gay, lesbian, and bisexual community the diversity within those respective communities, and *to show support* for the Irish-American homosexual and bisexual men and women in New York City who were seeking to participate in that city's St. Patrick's Day Parade.

418 Mass. at 241-42, 636 N.E.2d at 1295 (emphasis added).

C. No Compelling Interest Unrelated to the Suppression of Ideas Exists

The majority below predictably justified its insertion of GLIB's message into the parade by disparaging the decision of the parade group to enforce its views through the exclusion as "discriminatory acts." 418 Mass. at 251, 636 N.E.2d at 1300.

The dissent correctly concluded, however, that insertion of GLIB as an expressive group did not serve " 'compelling state interests, unrelated to the suppression of ideas,' " and was not narrowly tailored to the "evisceration of discrimination" envisioned by the statute. 418 Mass. at 258, 636 N.E.2d at 1303-04 (Nolan, J., dissenting). As applied, the statute suppressed the speech of the parade group. As the dissent stated,

> [B]ecause the judge's decision and order require the Veterans Council to allow GLIB to express itself,

> they violate the rule that, '[where] a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law [may] erect[] no obstacle to this end.'

418 Mass. at 258-59, 636 N.E.2d at 1304 (Nolan, J., dissenting) (quoting *New York State Club Association v. City of New York*, 487 U.S. 1, 13 (1988)).

CONCLUSION

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts should be reversed.

Respectfully submitted,

Of Counsel:
David K. Park
National Legal Counsel

Boy Scouts of America
Irving, Texas

George A. Davidson
(Counsel of Record)
Carla A. Kerr

Hughes Hubbard & Reed
New York, New York